

INDIVIDUALS WITH DISABILITIES EDUCATION ACT ("IDEA"), 20 U.S.C. § 1400
ARIZONA DEPARTMENT OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

Sara J. Vance, Hearing Officer
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In the Matter of

[REDACTED] by and through his
Parents, [REDACTED]

Petitioner,

v.

TEMPE UNION HIGH SCHOOL DISTRICT,

Respondent.

)
) **IMPARTIAL DUE PROCESS**
) **HEARING DECISION AND ORDER**
)

) Reference No. 05-021
)

) Hearing Dates: December 8, 9 & 10, 2004
)

) Held at: TUHSD District Office
) 500 W. Guadalupe Rd.
) Tempe AZ 85283-3599
)

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An index is attached hereto to identify specific personnel providing services to Student and witnesses at the Hearing. That index is designed to be detached before release of this Decision and Order as a public record.

I. DUE PROCESS PROCEDURAL HISTORY

A. Due Process Request and Pre-Hearing Matters

On October 25, 2004, Petitioner Student, by and through Student's Parents, (herein, "Petitioner" or "Parents") filed a request for due process ("Due Process Request") in this matter against Respondent District ("Respondent" or "District"). Four legal issues were identified in the Due Process Request. An additional issue for hearing was identified in a November 11, 2004 letter filed by Petitioner.

A pre-hearing telephone conference was held on November 12, 2004, with Petitioner's and Respondent's counsel and a representative of District. Confirmation of that pre-hearing telephone conference, and the procedures governing the due process hearing ("Due Process Hearing" or "Hearing") were set forth in a letter from the Hearing Officer to the parties dated November 15, 2004 ("Pre-Hearing Confirmation"). District's request for an extension of the 45 day requirement for holding the Due Process Hearing and issuing the final decision and order was granted for the reasons set forth in a Due Process Hearing Timeline Extension Confirmation also dated November 15, 2004.

On November 16, 2004, Petitioner requested that the Hearing Officer issue an order that District cease all direct communication with the family based on District's delivery of a 5 page letter from the Superintendent of District ("Superintendent's Letter") directly to Parents (with a copy to Petitioner's counsel). Respondent indicated that there was no objection to such an order, and that Respondent would voluntarily cease communications. An "Order to Cease Communications Regarding Due Process Issues" was entered on November 23, 2004. Petitioner also requested that the Hearing Officer deem the concessions offered in the Superintendent's Letter as incontrovertible; determination of that request was delayed until issuance of this Decision and Order and is addressed below.

On November 23, 2004, Petitioner requested that the Hearing Officer issue an order in connection with Respondent's request that Petitioner disclose a court-ordered evaluation report regarding Student. Parents understood that the report could not be disclosed to them, but juvenile court documents produced by Petitioner did not prohibit such disclosure. On November 29, 2004, the Hearing Officer entered an Order for Disclosure of Court-Ordered Evaluation Report, which Order imposed certain confidentiality requirements with regard to disclosure of that report ("Confidentiality Order").

Both parties timely disclosed their witness list and exhibits, except as noted below. Prior to the Hearing, Respondent withdrew Respondent's Exhibit 48.

B. Evidence Introduced at Due Process Hearing

Testimony and documentary evidence were admitted at the Due Process Hearing. Ten (10) witnesses testified at the Hearing. See Transcript of Due Process Hearing, Volumes I-III (herein, "Tr., p. _").

Admission of exhibits submitted in disclosure was discussed during the Due Process Hearing. Tr. pp. 9-16. In the disclosure process, Respondent District disclosed Exhibits numbered 1 through 52 (herein, "D. Ex."). Petitioner objected to

admission of Respondent's Exhibits 34, 36, 46, 48 (previously withdrawn by Respondent) and 50. Tr. p. 9, lines 21-23. All these exhibits (except Exhibit 48) were ordered to be admitted for the following reasons. Exhibits 34 and 50 were admitted, as agreed to by the parties, subject to the Confidentiality Order previously entered (for Exhibit 50), and a second confidentiality order (for Exhibit 34) dated December 13, 2004. Tr. pp. 9-10. Exhibit 36, the Due Process Request itself, was admitted as evidence of the due process request, but the statements made therein were not considered as evidentiary facts. Tr. pp. 10-12. Pursuant to the "5 Day Rule" [34 C.F.R. §300.509(a)(3)], Petitioner objected to admission of Exhibit 46, selected pages of the District's student handbook (listed in Respondent District's exhibit list as pages 26 through 48). In copying Exhibit 48, a two-sided document, every other page was inadvertently not included, and the missing pages were only disclosed when that error was discovered on December 2, 2004. The Hearing Officer admitted Exhibit 46 on the grounds that admission complied with the purpose of the 5 Day Rule (to prevent parties from strategically engaging in surprise tactics); testimonial evidence was to be presented regarding disciplinary procedures, and the student handbook was the best evidence of District's disciplinary policies. Tr. pp. 12-16. Thus, Respondent's Exhibits 1 through 47, and 48 through 52 were admitted into evidence.

Respondent did not object to admission of any of Petitioner's exhibits. Petitioner's Exhibits A through X ("P. Ex. _") were admitted into evidence.

C. Other Material Due Process Hearing Matters

At the Due Process Hearing, the Hearing Officer had indicated that there appeared to be a typographical error in the statutory citation in the second issue for hearing raised in the Due Process Request. Petitioner requested that the pleadings be conformed to the evidence, and Respondent did not object. The second issue for hearing was amended as set forth below. Tr. pp. 387-389.

Respondent District objected to Petitioner's introduction of evidence, through the testimony of Private Psychologist, of references to Attention-Deficit/Hyperactive Disorder as it was not raised anywhere in the Due Process Request and was not indicated in the summary of witness testimony, and Respondent was not given notice of the claim. Petitioner asserted that such evidence was rebuttal evidence and was presented because the testimony of Private Psychologist was taken out of order; Respondent and Petitioner had agreed to accommodate the schedule of Private Psychologist. The Hearing Officer required Respondent to proceed on the basis that School Psychologist had not yet testified, and that Respondent could use rebuttal witnesses to address this issue. Tr. pp. 390-402.

At the conclusion of the Due Process Hearing, both parties requested an extension of the 45 day deadline to allow the parties time to review the transcript of the Hearing prior to submitting post-hearing memoranda. Tr. p. 769. The parties' request for an extension of the 45 day requirement for holding the Due Process Hearing and issuing the final decision and order was granted for the reasons set forth in a Due Process Hearing Second Timeline Extension Confirmation dated December 13, 2004. Both parties timely submitted post-hearing memoranda.

II. DUE PROCESS ISSUES

The due process issues to be determined in this case are as set forth in the Due Process Request, as amended:

1. Did District fail to conduct a comprehensive reevaluation in all areas of suspected disability in violation of 20 U.S.C. § 1414(b)(2)(C), (3)(C)?
2. Did District make an erroneous manifestation determination in violation of 20 U.S.C. § 1415(k)(4)(C) which is subject to review and reversal pursuant to 20 U.S.C. § 1415(k)(6)(B)?
3. Did District fail to conduct an adequate functional behavior assessment or draft an appropriate behavior intervention plan prior to a disciplinary removal of ten school days or less in violation of 20 U.S.C. § 1415(k)(1)(B)(i)?
4. Did District attempt an inappropriate unilateral change in placement to an interim alternative educational setting in violation of 20 U.S.C. § 1415(k)(1)?
5. Did District fail to include a regular classroom teacher at the manifestation review for Student in violation of 20 U.S.C. § 1415(k)(4)(B)?

III. FINDINGS OF FACT

1. Since Student was in pre-school, Student has been receiving special education and related services due to a moderate visual impairment (including a visual field loss and noticeable involuntary eye movements). P. Ex. E, p. 3 & D. Ex. 3, p. 2; Testimony of Orientation & Mobility Specialist, Tr. p. 262.

2. With the exception of the event described herein, Student has had no disciplinary record during Student's school attendance. D. Ex. 41, pp. 5-7; P. Ex. A; Testimony of Special Education Department Chair, p. 97, lines 6-8; p. 127, lines 4-6; Testimony of Mother, Tr. pp. 659-660.

3. Since Student has been attending school, Student has had problems with math. Student's school records (including grades, test scores and teacher comments) indicate Student's math performance began to significantly decline starting in the fourth grade, with material deficiencies in math performance evidenced by 7th grade. P. Ex. V; Testimony of Private Psychologist, Tr. pp. 335-336 & 376-379; D. Exs. 1, 2 & 3; P. Exs. B, C & D.

4. Student had approximately 175 hours of private math tutoring at [REDACTED] between the end of the 6th grade through the 7th grade, and Student still was not doing well in math. Testimony of Mother, Tr. pp. 674-675.

5. Student has had continued problems with completion of homework, and some problems with completion of class work. D. Exs. 1, 2 & 3; P. Exs. B, C & D. Student has a long-time history of exhibiting anger and frustration at home connected with homework, and Father has spent thousands of hours helping Student with homework, particularly in math. Parents told Former District of this issue; Parents were instructed to reduce how much homework was completed. Testimony of Mother, Tr.

pp. 654-659. [Mother's testimony was uniformly candid and credible based on her demeanor and the content of her testimony.]

6. Completion of homework is important for Student's performance, and District claims that lack of effort by Student accounted for the history of homework issues. Testimony of Special Education Department Chair, Tr. pp. 171-172.

7. The individualized education program ("IEP") in place for Student from 3/17/03 to 3/17/04 ("2003-2004 IEP") provided for regular education classes, visual impairment related special education services, and an objective for completion of homework and class work. However, no evaluations of Student had been performed except as related to visual impairment. D. Ex. 2 & P. Ex. C; P Ex. I.

8. By the end of Student's 7th grade school year, Student had not completed the requirements to advance to 8th grade. Mother (at Parents' request) provided 60 hours of tutoring to Student over the summer of 2003 to enable Student to advance to 8th grade. D. Ex. 2.

9. In the summer of 2003, after Student's 7th grade year at Middle School, Student engaged in criminal conduct at Student's home. See D. Ex. 34.

10. At the time that criminal conduct occurred, an evaluation of Student would have shown Student had a learning disability in math, a significant weakness in processing speed, and a moderate weakness in working memory. See FOF ¶ 32 below & Testimony of Private Psychologist, Tr. pp. 324-327; Tr. p. 196, lines 10-22.

11. While Student attended Middle School, in the 7th grade, on more than one occasion, Mother expressed concern to Middle School personnel regarding Student's math performance. Testimony of Mother, Tr. pp. 649-653.

12. Based on Student's education records (as well as other evidence), Former District should have suspected and evaluated Student for Student's learning disability in math in the 7th grade. See FOF ¶ 32 below & Testimony of Private Psychologist, Tr. pp. 324-327 & 335-345. [School Psychologist's contrary testimony lacked a convincing foundation and conflicted with School Psychologist's determinations regarding Student prior to the filing of the Due Process Request. The foundation for the opinion of Private Psychologist was more convincing. See Testimony of School Psychologist, Tr. p. 620-624. The testimony of Special Education Department Chair regarding this issue was not credible because Special Education Department Chair's testimony typically evidenced rote responses lacking any independent analysis or professional expertise, and the testimony was sometimes based on conjecture, was inconsistent, and often was not logical. See, e.g., Tr. pp. 158, 161, 163 (lines 15-23)[conflicts with extensive evidence in the school records that work completion had been addressed for some time], pp. 184-185; & compare Tr. pp. 176 -177 with p. 200, lines 21-25 and with Testimony of School Psychologist, Tr. pp. 517, 622-623 (regarding use of Stanford 9 scores).]

13. In January, 2004, while Student was attending Middle School, Parents first determined that Student had engaged in inappropriate sexual conduct with Student's seven year old sister during the summer of 2003. Parents immediately

sought counseling services, and shortly thereafter reported Student's conduct to Child Protective Services. Testimony of Mother, Tr. pp. 660-663.

14. Parents did not report the inappropriate conduct to Middle School, and Student continued to attend Middle School. Testimony of Mother, Tr. p. 666.

15. On March 9, 2004, Middle School held a multidisciplinary evaluation team and IEP meeting. D. Ex. 3. As a courtesy, that meeting was attended by the Orientation & Mobility Specialist from High School who expressed an opinion that Student did not require Individuals With Disabilities Education Act ("IDEA") services for Student's visual impairment, and that a 504 (i.e. Section 504 of the Rehabilitation Act of 1973) plan would be appropriate. The Orientation & Mobility Specialist testified that meeting was a "rubber stamp for VI", intending to convey that there was no true assessment of Student's need for special education based on Student's visual impairment (Tr. p. 305, line 4). That meeting was also a rubber stamp for VI in the sense that Middle School did not make any attempt to consider whether Student had any other suspected disabilities.

16. The IEP developed at that March, 2004 IEP meeting, with a start date of 3/9/2004 and an end date of 3/9/2005 ("2004-2005 IEP") continued to provide that Student was to be educated in the regular classroom with supports and supplementary services. D. Ex. 6; P. Ex. B.

17. In August 2004, Student began attending High School. On September 9, 2004, an IEP review and educational placement meeting was held to review Student's 2004-2005 IEP from Former District's Middle School. D. Ex. 14; P. Ex. G. No regular education teacher for Student attended that IEP meeting. Tr. p. 191.

18. During that IEP meeting, Student's Grandfather and Mother raised the issue of Student's continued problems with math and a potential learning disability. Grandfather, a retired school administrator who had recently moved to Arizona, strongly advocated a need for an evaluation of Student, and Mother and Grandfather were told that High School needed to assemble a student study team. Testimony of Mother, Tr. pp. 688-689; D. Ex. 14; P. Ex. G.

19. During that September 9, 2004, IEP meeting, District's Orientation & Mobility Specialist indicated that Student's IEP goals and objectives were not appropriate on Former District's 2004-2005 IEP, and that he wanted to move Student to a 504 plan because Student could access the regular educational curriculum. The IEP team decided an additional visual evaluation was warranted. D. Ex. 14; Testimony of Orientation & Mobility Specialist, Tr. p. 303, lines 5-12; p. 308.

20. On September 9, 2004, Mother consented to the anticipated visual evaluation of Student, and requested in writing that a "psychological" be added to the evaluation. D. Ex. 15 & P. Ex. G-2; Testimony of Mother, Tr. pp. 688-689.

21. On September 13 and 14, 2004, District's Orientation & Mobility Specialist evaluated Student and recommended that Student be placed in 504 rather than continue to receive IDEA services. D. Ex. 17; Testimony of Orientation & Mobility Specialist, Tr. p. 278.

22. On or about September 22, 2004, District set up a student study team meeting to be held on October 6, 2004. See D. Exs. 21 & 22.

23. As of September 23, 2004, Student had not engaged in any inappropriate sexual conduct since the summer of 2003. Testimony of Mother (regarding lie detector results), Tr. pp. 723-724.

24. On September 29, 2004, near the end of the school day, the Superintendent for District received a letter from the Juvenile Probation Department of the Superior Court ("Notification Letter") stating that Student had been placed on probation and adjudicated for an offense determined to be a dangerous offense or an offense in violation of certain specified criminal statutes; that letter was issued in accordance with the requirements of A.R.S. § 8-350. D. Ex. 19, p. 2. That was the first time District knew Student was on probation. Testimony of Mother, Tr. p. 690, lines 15-25.

25. District has a consistent practice of recommending expulsion to District's Governing Board for all students for which District receives such a statutory notification. Testimony of Assistant Superintendent, Tr. pp. 27-28, 43-44 & 66. District's written policies governing discipline proceedings do not require such an expulsion recommendation. See D. Ex. 46, p. 29 & pp. 30-31; Tr. p. 70. District has always expelled all students for which District has received statutory notification of off-campus sexual crimes. Testimony of Assistant Superintendent, Tr. p. 71.

26. On October 1, 2004, Parents were contacted regarding the Statutory Notification, and Father took Student home that same day. Testimony of Father, Tr. p. 756; Testimony of Mother, Tr. p. 691.

27. Pursuant to a letter dated October 1, 2004, Principal notified Parents that Student would be suspended for 10 days based on a charge of "Criminal involvement in an off-campus offense indicating that the offender is likely to pose a threat to the safety or welfare of students or staff members or impair the normal educational process or educational climate", based on the Notification Letter. Parents were also notified that a recommendation for expulsion might be made, subject to an IEP meeting to be scheduled for a review of the relationship between Student's disability and the behavior subject to disciplinary action. D. Ex. 20. Parents were not provided with any procedural safeguards notice in connection with the October 1 letter. Testimony of Mother, Tr. p. 691.

28. On October 6, 2004, a Multidisciplinary Evaluation Team ("MET") meeting was held for Student (the student study meeting became an MET meeting when it was determined testing was required). D. Ex. 22 ; P. Ex. F. No regular education teacher of Student attended. Testimony of Special Education Department Chair, Tr. p. 191. [Although School Counselor's name is listed as a regular education teacher, School Counselor was not a regular education teacher for Student. Testimony of Mother, Tr. p. 692.]

29. At that October 6 MET meeting, Mother and Grandfather reported Student gets violent at home, and angry and frustrated, but never had any disciplinary problems at school. Student's math problems were discussed. The MET team

decided that Student required additional testing for eligibility for a special learning disability. D. Ex. 22; Testimony of Mother, Tr. p. 687; Testimony of School Psychologist, Tr. p. 458. Mother authorized in writing further evaluations for cognitive ability and academic achievement. D. Ex. 23.

30. Information available to the MET team on October 6, 2004 (or subsequently), did not indicate that Student had any one or more of the characteristics that constitute an emotional disability, as defined in 34 C.F.R. § 300.7(c)(4), over a long period of time and to a marked degree, and there was no factual basis for High School to suspect Student had an emotional disability. Testimony of School Psychologist, Tr. pp. 408-410, 438, 441-442, 479, 529-530; Testimony of Special Education Chair, pp. 86-87, 98.

31. Information available to the MET team on October 6, 2004 (or prior to the Due Process Hearing), did not indicate that Student exhibited sufficient symptoms of inattention that persisted for at least six months or to a degree that were maladaptive, in the educational or the home setting, that would have given High School a factual basis to suspect Student had an attention deficit hyperactive disorder, inattentive subtype. Testimony of School Psychologist, Tr. pp. 424-427, 441-442, 514-516, 521-529. [Although Private Psychologist testified that Private Psychologist suspected Student had attention deficit hyperactive disorder, inattentive subtype, based on a review of Student's educational records (Tr. pp. 340-341), Private Psychologist had not observed Student, and did not appear to rely on the Diagnostic and Statistical Manual of Mental Disorders, DSM-IV criteria (Tr. pp. 369-370) relied upon by School Psychologist. School Psychologist's testimony was more compelling because School Psychologist had also observed Student and School Psychologist provided a reasoned explanation for why the records and other evidence available to School Psychologist did not support that Student has a suspected attention deficit hyperactive disorder.]

32. District gave Parents a Prior Written Notice dated October 6, 2004, that indicated that the MET team "would like current psychoeducational testing from which to make informed eligibility decisions, determine present levels of performance and educational needs, and develop interventions". D. Ex. 24. Parents thought that a full psychological evaluation would be performed. Testimony of Mother, Tr. p. 700.

33. On October 7, 2004, School Psychologist evaluated Student and determined that Student had a significant weakness in processing speed and a moderate weakness in working memory. Processing speed is the indication of the rate Student would solve problems or perform work. Working memory is a measure of storage for immediate problem solving for short-term memory. Additionally, Student was determined to be functioning cognitively in the average range, but had significant areas of weakness in math based on academic achievement standard scores. School Psychologist recommended that the MET team consider Student for special education eligibility as a student with a Specific Learning Disability in the area of math calculation. School Psychologist also recommended that the MET team consider Student for special education eligibility as a student with a Visual Impairment based on academic issues related to visual fatigue. P. Exs. E & J; D. Ex. 26. Testimony of School Psychologist, Tr. pp. 423-424, 429 Testimony of Private Psychologist, Tr. pp. 332-333.

34. From Monday, October 11, through Friday, October 15, 2004, High School had a fall holiday break and no classes were conducted. D. Ex. 49. Thus, Student's 10 day suspension was through Thursday, October 21, 2004. See D. Ex. 19. p. 1.

35. On October 19, 2004, a Multidisciplinary Evaluation Team ("MET") meeting was held for Student. P. Ex. E & E-3; D. Ex. 26. No regular education teacher of Student attended. Testimony of Special Education Department Chair, Tr. p. 191; Testimony of Mother, Tr. p. 699. The MET agreed that Student needed special education services in the area of math. The team also agreed that it was appropriate to address Student's visual impairment needs through an IEP rather than having an IEP and a 504 plan. P. Ex. E. 3; D. Ex. 26. Parents were "elated" to learn that Student had been determined to have a learning disability in math because of the long frustration with math performance. Tr. pp. 759-760.

36. On October 20, 2004, at approximately 4:00 p.m., Student's IEP team was convened to determine if Student's off-campus crime that occurred in the summer of 2003 was a manifestation of Student's disability (herein "Manifestation Determination Meeting"). No personnel from Middle School attended that Manifestation Determination Meeting. D. Ex. 29; P. Ex. N-2. None of Student's regular education teachers attended that Manifestation Determination Meeting. Testimony of Special Education Department Chair, Tr. p. 191; Testimony of Mother, Tr. p. 707. Special Education Department Chair testified that no regular education teacher was invited to the Manifestation Determination Meeting to keep information presented there "confidential" but admitted that all regular classroom teachers are bound by the requirements of privacy and confidentiality. Tr. p. 120; p. 193.

37. At the Manifestation Determination Meeting, Parents indicated that Student's actions in the summer of 2003 were related to Student's frustration over school performance and that frustration and rage would overtake Student at home that was never expressed at school. D. Ex. 29; P. Ex. N-2. Testimony of Mother, pp. 709-710.

38. At the Manifestation Determination Meeting, the three part determination under 20 U.S.C. § 1415(k)(4)(C)(ii) was made by the IEP team (with (k)(4)(C)(ii)(I) broken down into two components). Tr. p. 127-128; Tr. pp. 452-477. Parents disagreed with High School team members on all three statements. D. Exs. 29 & 30; P. Ex. N.

39. For the first determination, Parents indicated that Student's placement at High School and Middle School was not appropriate due to Student's diagnosed learning disability in math, while High School team members agreed that Student's placement at Middle School was appropriate. D. Ex. 29; P. Ex. N-2. High School team members assumed Student's IEP was appropriate because they only needed to consider the appropriateness of the IEP for Student's disability of visual impairment. See Testimony of Special Education Department Chair, Tr. pp. 127-129 & 208; Testimony of Orientation & Mobility Specialist, Tr. p. 287. School Psychologist also relied on the visual impairment, and went further and thought the IEP had to be

appropriate because the behavior had not yet occurred when the IEP was prepared. Testimony of School Psychologist, Tr. pp. 456-457.

40. For the second and third determinations, the High School members of the IEP team applied the disability of visual impairment in making their conclusions. See Testimony of Special Education Department Chair, Tr. pp. 134-135 & 137-139; Testimony of Orientation & Mobility Specialist, Tr. p. 289; & Testimony of School Psychologist, Tr. pp. 467 & 471; Testimony of Orientation & Mobility Specialist, Tr. p. 279. The focus on Student's visual impairment caused the High School members of the IEP team to discount Parents' information regarding Student's anger and frustration. Testimony of Special Education Department Chair, Tr. pp. 138-139; [Although there was some documentary evidence that Student's learning disability was considered by the IEP team, D. Ex. 29 & P. Ex. N-2, this was contradicted by the testimony of the actual determinations made by the High School team members.]

41. District witnesses testimony at the Due Process Hearing indicates that they have already pre-determined that Student's sexual misconduct would not be a manifestation of Student's learning disability. Testimony of Special Education Department Chair, Tr. p. 136, lines 19-23; Testimony of Math Teacher, Tr. pp. 245-247; Testimony of School Psychologist, Tr. pp. 469-470.

42. Immediately after the IEP team made the manifestation review, Parents provided certain letters regarding Student to the IEP team, including a letter from Student's current therapist that states that Student experiences a high level of frustration due to the inability to comprehend concepts being taught, and that Student acts out of this frustration in ways that are self-described as inappropriate. P. Ex. P; D. Ex. 30; Tr. pp. 139, 703.

43. After the manifestation determination, the IEP team reviewed District's form for a functional behavior analysis ("FBA") and inserted Parents' input on that form. No District IEP team members contributed any input to the extensive list of behaviors in Items 1 through 7 of the FBA, but only contributed to Number 8 (other concerns), "engaged in inappropriate sexual behavior". Parents did not understand the purpose of the FBA. P. Ex. N-1; Tr. pp. 140-144; 484-486; 711-712.

44. The IEP team then proceeded to review District's behavioral intervention plan ("BIP") form. IEP team members all assumed that the sexual misconduct that took place at home (i.e. off-campus) in the summer of 2003 was the only behavioral issue to be considered so that no intervention was required other than Student's continuation of court-ordered counseling. Tr. pp. 144, 487-488.

45. At the end of the Manifestation Determination Meeting, High School team members offered to continue to provide home school instruction since the last day of Student's 10 day suspension was the following day, October 21, 2004. Parents were told they would be contacted the following day. Parents were also told, or at a minimum, Parents understood, that Student could not come back to High School on October 22, 2004. Testimony of Mother, Tr. pp. 742-743. Mother asked for a prior written notice for a change of placement, and was told that a change of placement had not been made at that time. D. Ex. 29; P. Ex. N-2; Testimony of Special Education Department Chair, Tr. p. 149, lines 11-16; p. 153, lines 11-23.

46. On October 21, 2004, School Psychologist did not work due to an illness of School Psychologist's child. Testimony of School Psychologist, Tr. p. 493.

47. On October 21, 2004, someone called Parents to let them know that homework had been collected for Student; Father asked to talk to the Vice Principal to confirm the attendance situation for Student. The Vice-Principal told Father that arrangements were being made for alternative means of serving Student that would not be in place until the following week, and that Student was "not welcome back" at the High School. P. Ex. W; Testimony of Father, Tr. p. 763. [Although Father had little independent recollection of the phone call, Father's testimony of his habit of making notes of telephone calls was credible and District did not dispute the Vice-Principal's statements other than to indicate that they did not represent District's intent (Testimony of Assistant Superintendent, Tr. pp. 39-40).]

48. On October 21, 2004, Principal sent a Notice of Intent to Expel to Parents, which indicated that an expulsion recommendation would be presented to District's Governing Board on November 3, 2004. D. Ex. 35.

49. On October 25, 2004, the Due Process Request was filed, and as a result, District has not yet made such an expulsion recommendation. See D. Ex. 39; Testimony of Assistant Superintendent, pp. 36-37. On October 26, 2004, District allowed Student to return to High School. Tr. p. 716.

50. On November 15, 2004, an IEP meeting was held for Student, and an IEP was developed to address Student's learning disability in math and other evaluation results. D. Ex. 41; P. Ex. A.

51. Student is currently attending High School, but is escorted to every class, and Student's performance has fallen sharply since Student has returned to High School. Testimony of Mother, Tr. pp. 717-718.

52. Superintendent's Letter continuously reiterated, in underlined portions, that Parents did not need to proceed to a hearing, and provided, among other things, that: (1) if Parent disagreed with District's evaluation of Student, Parents were entitled to an independent education evaluation, without the need for a due process hearing; (2) that District was willing to provide 12 hours of compensatory education for the 12 hours of class time Student missed; (3) that District would conduct another manifestation determination with a regular education teacher and different District personnel could attend; and (4) that District would provide an independent functional behavior assessment at no cost to Parents. D. Ex. 44.

IV. CONCLUSIONS OF LAW; RATIONALE

A. Burden of Proof.

The Ninth Circuit Court of Appeals has consistently held that the school has the burden of proving compliance with the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400, *et. seq.*, at the Due Process Hearing. *Seattle School District v. B.S.*, 82 F.3d 1493, 1498 (9th Cir. 1996); *Clyde K. v. Puyallup School District*, 35 F.3d 1396, 1398 (9th Cir. 1994). Burden of proof is the duty of affirmatively proving a fact in dispute. District has the burden of proving, by a

preponderance of the evidence, that District has complied with the requirements of IDEA, and provided a free appropriate public education ("FAPE") to Student.

B. Comprehensive Evaluation Requirements

IDEA mandates evaluation procedures for reevaluations. Those procedures require that a child "is assessed in all areas of suspected disability." 20 U.S.C. § 1414(b)(3)(C). IDEA also requires that District use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 20 U.S.C. § 1414(b)(2)(C). Based on these legal requirements, the Due Process Request alleged that District failed to evaluate Student for a possible emotional disability. District proved, by a preponderance of the evidence, that emotional disability is not a suspected disability for Student. FOF ¶ 30. For the first time at the Due Process Hearing, Petitioner asserted that District failed to evaluate Student for a possible attention deficit hyperactive disorder, inattention subtype (herein, "ADD"). District proved, by a preponderance of the evidence, that ADD is not a suspected disability for Student. FOF ¶ 31.

However, IDEA's implementing regulations require that a child be "assessed in all areas related to the suspected disability", including, if appropriate, emotional status. §300.532(g). They further require that in evaluating each child with a disability, "the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified". §300.532(h)(emphasis added).

Parents have the right to an independent educational evaluation at public expense if Parent disagree with an evaluation obtained by District. 20 U.S.C. §1415(b)(1); 34 C.F.R. §300.502(b)(1). Parents had been attempting to obtain a "psychological" evaluation of Student since September 6, 2004. Extensive evidence was presented that Student has had difficulties in completing homework (and often class work) throughout Student's school career. Additionally, there was evidence that failure to complete homework would adversely affect Student's grades and educational performance. Although District blamed that problem on Student's lack of motivation, District's recent evaluation provided one explicit and inherent basis for Student's difficulties: Student has a significant impairment in processing speed, as well as a moderate weakness in working memory. District was also aware, at least as of October 6, 2004, when the MET was determining what evaluations of Student were appropriate, that Student had been consistently angry and frustrated in completing homework. At that October 6, 2004 meeting, the MET team appropriately determined that testing and evaluation for a potential learning disability was justified. However, District members of the MET team ignored input from Mother and Grandfather regarding Student's anger and frustration related to homework in determining whether other evaluations were required. Whether or not this anger and frustration are linked to Student's learning disability category, these emotional issues are explicitly and adversely affecting Student's education, and an appropriate evaluation is required to determine how these issues affect Student's special education needs. See §300.532(h). Parents disagreed with District's evaluation because it did not provide a complete evaluation of Student's special education needs. Parents are entitled to an

independent psycho-educational evaluation to identify all of Student's special education and related services needs, at District's expense.

C. Review of Manifestation Determination

Given the unique facts of this matter, determining the appropriate approach for the manifestation determination review was difficult for the IEP team. The Manifestation Determination Meeting occurred in October, 2004, but was necessitated by criminal behavior that occurred in the summer of 2003, and District's subsequent notice of that behavior on September 29, 2004. The criminal behavior occurred off-campus and Student had been attending school for more than one school year, without any disciplinary issues. While IEP team members made their review in good faith, errors occurred in the manifestation determination as described below. Based on these errors, District has not demonstrated that Student's behavior was not a manifestation of Student's disability consistent with the requirements of 20 U.S.C. § 1415(k)(4)(C). See 20 U.S.C. § 1415(k)(6)(B).

The steps for conducting the manifestation determination review require consideration in several instances of "the behavior subject to disciplinary action". The IEP team considered the "behavior subject to disciplinary action" as the sexual misconduct that occurred in the summer of 2003. Parents now assert that the IEP team should instead have considered the actual disciplinary charge, which includes additional assumptions, that the off-campus offense indicates that the offender is likely to pose a threat to the safety or welfare of students or staff members or impair the normal educational process or educational climate. While Parents make a compelling argument, the only "behavior", i.e. action taken by Student, was the sexual misconduct. Although the disciplinary charge includes additional criteria, IDEA requirements focus on "behavior". The additional criteria would have to be proved by District at any expulsion proceeding, but the validity of the charge itself is not determined in the manifestation review.

However, the IEP team also looked back to the summer of 2003 to make other determinations in the manifestation review that were not appropriate. Additionally, there was sometimes conflicting information about what individual IEP team members were actually considering in the manifestation review. The initial action required to be taken by the IEP team in making the manifestation determination was to consider all relevant information, including evaluation and diagnostic results, relevant information supplied by the parents of the child, observations of the child and the child's IEP and placement. 20 U.S.C. § 1415(k)(4)(C)(i). The specific determinations made by District members of the IEP team did not truly consider Student's evaluation information after the summer of 2003, including Student's significant impairment in processing speed, moderate weakness in working memory, and the then undiagnosed learning disability in math. However, based on the timing issues affecting the manifestation review, the IEP team should have considered all information known on October 20, 2004, not just information that was known in the summer of 2003 because the manifestation determination was being made on October 20, 2004. Specifically, the evaluation completed on October 19, 2004 should have been considered in reviewing Student's behavior in the summer of 2003. Given the unique facts of this matter, all of this information as well as Student's extensive history of inability to complete homework,

combined with Parents reports regarding Student's anger and frustration, should have been given serious consideration by the entire IEP team. See 34 C.F.R. §300.523(c) & *Letter to Yudian*, 39 IDELR 242 (8/1/2003) [and the regulatory analysis quoted therein, 64 Federal Register 12625 (March 12, 1999)].

At the Manifestation Determination Meeting, the three part determination under 20 U.S.C. § 1415(k)(4)(C)(ii) was made by the IEP team. The IEP team first addressed 20 U.S.C. § 1415(k)(4)(C)(ii)(I):

in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement

This determination was broken down into two components. The first component was whether the IEP and placement were appropriate. The District members of the IEP team uniformly found that Student's IEP and placement were appropriate while Parents disagreed. The IEP team relied upon Student's 7th grade IEP and placement in addressing this issue, without considering later information. District IEP members did not consider Student's learning disability in math, which had not been diagnosed in the summer of 2003, in determining whether the IEP and placement were appropriate. Student's 2003-2004 IEP and placement were not appropriate.

Despite Parents arguments to the contrary, the appropriateness of the IEP and placement alone is not determinative. The IEP team must still determine whether the IEP and placement were appropriate in relationship to the behavior subject to disciplinary action, after taking into account later evaluation and other information available to the IEP team. In applying that behavioral relationship determination, the appropriate question for the IEP team is not whether the 7th grade IEP should have foreseen Student's later criminal conduct, but whether an appropriate IEP and placement would have affected the later criminal conduct.

The IEP team then addressed each of the following determinations:

(II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

20 U.S.C. § 1415(k)(4)(C)(ii)(II)& (III). In each case, the District IEP team members identified and applied Student's disability in making the foregoing determinations only as "visual impairment". This focus on visual impairment also caused District IEP members to discount Parents' information regarding Student's anger and frustration because Student had been living with that visual impairment all of Student's life. The applicable disability that IEP team members should have applied in the manifestation determination was both Student's learning disability in math, which was not properly identified by Former District, as well as Student's visual impairment. As one court noted, the statutory term "child's disability" does not include the phrase "as identified by the school district." *Richland School District v. Thomas P.*, 32 IDELR 233, at 765 (D.

Wis. 2000)(upholding the hearing officer's consideration of evidence of a different disability than the one for which the student was receiving special education services).

D. Functional Behavior Assessment and Behavior Intervention Plan

IDEA requires District to convene an IEP meeting to develop an assessment plan to address the behavior that resulted in the disciplinary action. 20 U.S.C. § 1415(k)(1)(B)(i); 34 C.F.R. §300.520(b)(1)(i). IDEA's implementing regulations then require, after developing the assessment plan and completing appropriate assessments, that the IEP team be convened to develop appropriate behavioral interventions to address that behavior; District is also required to implement those interventions. District established that the functional behavior assessment ("FBA") prepared on October 20, 2004, was performed within the time required by IDEA and its implementing regulations, because the FBA was conducted prior to the end of Student's ten school day suspension. See 20 U.S.C. § 1415(k)(1)(B) & 34 C.F.R. § 300.520(b).

No particular form of an assessment plan is required by law. However, District IEP team members made no meaningful effort to develop an appropriate assessment plan for Student, apparently because they did not view Student's 2003 conduct as impacting the school environment since Student's conduct occurred at home. However, the underlying purpose of the statutorily required assessment plan is to address the underlying basis for the behavior resulting in disciplinary action, and then prepare an appropriate behavior intervention plan ("BIP"). See generally 20 U.S.C. § 1415(k)(1)(B) & 34 C.F.R. § 300.520(b). District IEP team members failed to make any meaningful assessment. Student's disciplinary action involves the likelihood that Student poses a threat to the safety or welfare of students, and District needed to make an assessment plan that would provide a basis for determining appropriate behavioral interventions.

E. District's Change of Placement

High School personnel are authorized by IDEA to change Student's placement through a suspension for not more than 10 consecutive school days. 20 U.S.C. § 1415(k)(1)(A); 34 C.F.R. § 300.520. For any longer change of placement, IDEA explicitly requires written prior notice to parents. See 20 U.S.C. § 1415(b)(3). High School personnel changed Student's placement at the latest on October 21, 2004 (effective on October 22, 2004), in violation of IDEA, and without prior written notice to Parents. District informed Parents that Student could not return to High School on October 22, 2004, and District failed to timely schedule an IEP meeting to address Student's placement. High School's attempt to have Parents accept an "offer" for homebound services does not excuse District's obligations to allow Student to return to Student's placement at the end of the ten day suspension.

F. Regular Education Teacher Required at Manifestation Determination Review Meeting.

IDEA requires that the manifestation determination review be carried out by Student's IEP team and other qualified personnel. 20 U.S.C. § 1415(k)(4)(B)&(C); 34 C.F.R. §523(b) & (c). IDEA does not require that Former District's Middle School

personnel attend such meeting. However, the IEP team must include at least one regular education teacher of such child if the child, like Student, is participating in the regular education environment. 20 U.S.C. § 1414(d)(1)(B)(ii). District admits that none of Student's regular education teachers was present at the Manifestation Determination Meeting. District personnel asserted that no regular education teacher was present at the Manifestation Determination Meeting due to confidentiality issues. This rationale was not credible as District had also failed to have a regular education teacher in attendance at the IEP team review meeting held on September 9, 2004 before District had been informed of Student's off-campus criminal conduct, or at the MET meeting on October 19, 2004. Additionally, there is no legal exception for IEP team members when confidential issues are involved, and all District employees are subject to the same applicable privacy and confidentiality laws.

District asserts that the failure to have a regular education teacher present at the Manifestation Determination Meeting is a harmless error. Parents assert it is a "structural defect" that mandates a finding that District did not provide a FAPE to Student under *M.L. v. Federal Way School District*, 2004 WL 2480943 (9th Cir. 11/5/04). While Senior Circuit Judge Alarcón applied a structural defect analysis in *M.L.*, the concurring and dissenting judges applied the prior consistent Ninth Circuit test regarding procedural errors, and that majority test is applied herein. The Ninth Circuit has consistently held that there is a denial of FAPE if procedural inadequacies: (1) result in the loss of educational opportunity (or cause a deprivation of educational benefits); or (2) seriously infringe the parents' opportunity to participate in the IEP formulation process. See, e.g., *Shapiro v. Paradise Valley Unified Sch. Dist.* No. 69, 317 F.3d 1072, 1076-1077 (9th Cir. 2003); *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 894 (9th Cir. 2001); & *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1484 (9th Cir. 1992).

Although the Ninth Circuit Court of Appeals has not applied this test to a manifestation determination review by an IEP team, the legal requirements for IEP team members are the same as for an IEP meeting. See 20 U.S.C. § 1415(k)(4),(5)(A). The manifestation determination review determines whether District has the right to apply its disciplinary expulsion procedures to Student. Although pursuant to 20 U.S.C. Section 1412(a)(1), District will still have the legal obligation to provide IDEA services to Student even if Student is expelled, District will not be required to provide those services in a District school. As such, the manifestation determination review directly affects educational opportunities for Student. Additionally, Parents' opportunity to participate in the manifestation determination review was directly affected by the absence of a regular education teacher of Student because Parents did not have an opportunity to ask questions and obtain requested input from a regular education teacher in the Manifestation Determination Meeting.

G. Requested Superintendent's Letter Relief

Parents requested that the Hearing Officer deem the concessions offered in the Superintendent's Letter, D. Ex. 44, as incontrovertible. That request is denied.

H. Analysis of Requested Legal Remedies

As determined in Sections C and F above, there were errors in conducting the manifestation review. Parents assert the appropriate remedy for such errors is to hold that Student's behavior is not a manifestation of Student's disability. Parents rely in part on a letter issued to a State Department of Education by the U.S. Department of Education's Office of Special Education Programs. See *Letter to Brune*, 40 IDELR 46 (3/17/2003). *Letter to Brune* does not address circumstances involving a hearing officer's determination of deficiencies in a manifestation review, but instead provides direction for appropriate considerations by schools in conducting manifestation determination reviews when no due process request has been made.

District cites numerous hearing officer decisions supporting a hearing officer's authority to order a school district to conduct a second manifestation review meeting (and to conduct another IEP meeting). See, e.g., *School District of Philadelphia*, 102 LRP 28599 (SEA Pa. 2002); *Searcy Public Schools*, 30 IDELR 825 (SEA Ark. 1999); *Dallas Sch. Dist.*, 28 IDELR 1225 (SEA Ore. 1998). IDEA provides for the IEP team to make the manifestation determination, and legal authorities support reconvening a manifestation determination review meeting if there is a legal determination of errors in the initial manifestation determination.

Parents further allege that returning the manifestation determination to the IEP team would be a futile act as the team would necessarily reach the same result. Given the unusual circumstances of this case, District acted erroneously, but did not act in bad faith in making its manifestation determination. There is no reason to anticipate that District IEP team members would not act appropriately in a second manifestation review meeting. However, IEP team members testifying in the Hearing have expressed predetermined opinions on the manifestation determination, and there are legitimate concerns in having those individuals follow the legal guidelines set forth herein. On those grounds, a different IEP team will be ordered to reconvene the manifestation determination as set forth below. That IEP team needs to make a manifestation determination based on the guidelines set forth in Section C above, and any information Parents may provide, including information Parents did not provide to the prior IEP team until after the manifestation determination.

Parents have requested compensatory education. The Ninth Circuit Court of Appeals has determined that compensatory education is an equitable determination. There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. *Parents of Student W v. Puyallup Sch. Dist.*, 31 F.3d 1489 (9th Cir. 1994). Based on the uncertainties faced by Student and Parents regarding when Student could return to High School, and the unilateral change of placement in violation of IDEA, Petitioner is equitably entitled to twenty hours of compensatory education.

I. Prevailing Party

Based on resolution of all due process issues, Petitioner is the prevailing party. Based on the findings herein, the settlement proposed in the Superintendent's Letter, viewed as a whole, would not have provided appropriate relief.

J. Arizona Regulation Findings

The Arizona regulations governing due process standards for special education require that a hearing officer render findings of fact and a decision on specific identified issues. Ariz. Admin. Code § R7-2-405(H)(4). Those specific issues are addressed as follows:

(i) To the extent described herein, the evaluation procedures utilized in determining Student's needs have not been appropriate in nature and degree.

(ii) The diagnostic profile of Student on which Student's current placement is based is substantially verified.

(iii) To the extent described herein, the evidence presented, and the conclusions of law set forth herein, establish that Student's rights have not been fully observed.

(iv) Subject to further evaluation, Student's current placement has been determined to be appropriate to the needs of Student.

(v) The placement of Student in the special education program is with the written consent of Parents.

IV. ORDER

IT IS ORDERED that:

- A. District shall provide Parents with an independent psycho-educational evaluation, at District's expense, to identify all of Student's special education and related services needs. Within ten school days of the date of this Order, District shall provide Parents with the criteria that District uses when District initiates such evaluations, a list of at least five qualified examiners, and the credentials of those examiners. District shall ensure prompt payment for such evaluation. Within ten school days after District's receipt of such evaluation results, District shall further convene an MET meeting and IEP meeting to consider the results of such evaluation, and appropriate changes to Student's IEP and placement based on that evaluation.
- B. District shall provide Parents with an independent functional behavior assessment at District's expense. District shall ensure prompt payment for such assessment. After that assessment has been performed, District shall promptly schedule an IEP team meeting to prepare a behavioral intervention plan in accordance with that assessment.
- C. District shall provide twenty (20) hours of one-on-one tutoring services to Student. Such tutoring shall be provided by a special education teacher and shall address the academic subjects of Student's regular education coursework. Such tutoring shall be provided according to a time schedule reasonably convenient to, and which is acceptable to, both District and Parents.
- D. Within ten school days of the date of this Order, District shall convene an IEP team meeting to conduct a manifestation determination review in accordance with the terms of this Decision and Order. District shall ensure that all High

School employees required as members of the IEP team under IDEA, including at least one of Student's regular classroom teachers, attend the manifestation determination meeting, and shall further ensure that High School members of that IEP team, to the maximum extent possible, shall not include witnesses from the Hearing or personnel from the prior manifestation determination. Student shall continue in Student's High School placement pending that manifestation review.

V. APPEAL

Either party has the right to appeal this Decision to the Office of Administrative Hearings within thirty five (35) calendar days after receipt of this Decision. A.A.C. § R7-2-405(H)(5). Requests for appeal must be submitted in writing to: Dispute Resolution Coordinator, Arizona Department of Education, Exceptional Student Services, 1535 W. Jefferson, Phoenix, Arizona 85007. A.A.C. § R7-2-405(J)(1).

Ordered this 18th day of January, 2005.

By


Sara J. Vance

Due Process/Hearing Officer